Information Technology Association of America (ITAA), however, California III vacated and remanded the entire cost-benefit analysis in the Computer III Remand Order on which structural relief was predicated, and all structural relief granted in that order along with it.[33] Because the structural relief granted in the Computer III Remand Order was entirely vacated, the proper starting point for the policy cost-benefit analysis in this proceeding is complete structural separation under the prior Computer II rules. The Commission, however, frames the choice as the opposite -- i.e., whether nonstructural safeguards should be continued or structural separation reimposed.[34]

If the Commission, by incorrectly assuming that the starting point is structural integration under CEI plans, proceeds under such an elementary misapprehension of the current legal landscape, any structural relief granted at the conclusion of this docket is virtually certain to be reversed. In order to balance the relevant factors properly, the Commission has to begin with the assumption that the BOCs are now legally subject to the Computer II structural separation requirement, but for the pending temporary waiver, and that the BOCs therefore must show that structural separation should once again be eliminated. As

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[33] Reply of MCI Telecommunications Corporation in Support of the ITAA Petition for Reconsideration, Bell Operating Companies' Joint Petition for Waiver of Computer II Rules (March 15, 1995).

[34] See, e.g., Further Notice at ¶ 53.

the primary prevailing party on the structural separation issue in both California I and California III, MCI strongly urges that the Commission at least try to start in the right place this time around.[35]

Another analytical flaw that truncates the policy choice posed in the Further Notice starts with the observation that the Commission's findings as to the costs of structural separation were upheld in both California I and California III, as if such dicta put that issue to rest forever.[36] In fact, however, just as ONA was approved in California I, 905 F.2d at 1233, but rejected in California III as a basis for structural relief, 39 F.3d at 929-30, the Commission's prior analyses of the costs of structural separation cannot automatically be assumed to constitute a rational basis for structural relief in a new cost-benefit balance in light of a new record.

By its very nature, a cost-benefit analysis must consider all relevant factors on both sides of the balance.[37] If the Commission omits a relevant factor, a reviewing court will be

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[35] For the Commission's convenience, a copy of MCI's Comments on the ITAA Petition for Reconsideration will be submitted under separate cover as Tab A. All of the exhibits submitted with Tab A will be similarly identified (e.g., "Tab B").

[36] Further Notice at ¶ 47 & n. 145.

[37] See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); California I, 905 F.2d at 1230; Sierra Club v. Sigler, 695 F.2d 957, 978 (5th Cir. 1983); Rybachek v. United States EPA, 904 F.2d 1276, 1289 (9th Cir. 1990).

forced to reverse, since the court "cannot guess at how the FCC would have balanced" all of the relevant factors.[38] Moreover, whatever issues may have been decided in Computer III and the Computer III Remand Orders are now open for de novo review, those orders having been vacated in California I and California III.[39] The Commission must therefore consider anew all of the costs and benefits of structural separation vis-a-vis nonstructural safeguards in making its decision. As explained below, the costs of structural separation for BOC intraLATA information services are now far less than previously assumed, shifting the cost-benefit balance in favor of structural separation.

Because the Commission apparently takes the incorrect view that certain aspects of the necessary cost-benefit analysis have been put to bed forever, they are not discussed in the Further Notice. MCI's comments will therefore address a somewhat broader range of issues than is sought by the Further Notice. MCI's comments will explore all of the costs and benefits of moving from the current Computer II structural separation regime to fully integrated BOC information services. Whether or not the factors discussed below were mentioned in the Further Notice, of course, they must in any case be addressed by the Commission to avoid reversal under the case law applying the arbitrary and

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[38] California I, 905 F.2d at 1238 n.29.

[39] See U.S. v. Munsingwear, Inc., 340 U.S. 36, 40 (1950)(vacateur of order below deprives it of any binding effect, "clear[ing] the path for future relitigation of the issues").

capricious rubric.[40]

As will be explained, the benefits of structural integration have not been demonstrated, and the competitive and ratepayer risks have grown, not lessened, since Computer III. Accordingly, structural separation should be retained, at least until the BOC network can be fundamentally unbundled as originally envisioned in Computer III and as it should be unbundled under Section 251, or, even more ideally, significant local competition develops.

II. THE BOCS CANNOT DEMONSTRATE ANY SIGNIFICANT BENEFITS FROM STRUCTURAL INTEGRATION

As mentioned above, the Further Notice, apparently on the assumption that certain issues have been resolved and need not be reconsidered now, entirely omitted one side of the cost-benefit balance that must be weighed, namely, the benefits that supposedly would be derived from the elimination of structural separation. Since California III returned the industry to structural separation, the first issue that must be examined on remand is whether there are any significant public benefits resulting from a change to structural integration that could not have been brought about by alternative means under structural separation.

Contrary to the Commission's implicit presumption, such benefits cannot be assumed; in fact, as discussed below, it is

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[40] See, e.g., California I, 905 F.2d at 1230-31.

quite clear that such benefits have not been and cannot be demonstrated. Thus, even in the absence of significant ratepayer and competitive risks, the only rational outcome of the cost-benefit analysis that must be performed is to continue structural separation.

In analyzing the supposed benefits of eliminating structural separation, each element of the necessary benefits assessment is important: the supposed benefits must be significant; they must be public benefits, rather than merely benefits to the BOCs; the benefits must result from structural integration; and they must result only from structural integration -- i.e., it must be shown that such benefits could not have been generated in some other way under structural separation.

A. The BOCs Cannot Show Significant Benefits to Their Information Services From Structural Integration

The BOCs cannot come close to making such a showing. First, even after a decade of integrated BOC information services under the orders vacated in California I and California III and various waivers, the BOCs do not have much to show for all of the hype generated on this issue. Other than voice messaging services and electronic directory services -- both of which, as will be discussed below, have benefitted from BOC discrimination against competitors -- MCI is not aware of any BOC information service offerings that have made significant headway in the marketplace. The BOCs never had any success with the interactive

video and other interactive services they were planning, and their online gateway services finally folded after they failed to generate much interest.[41] Thus, except for larger numbers of voice messaging customers, the BOCs' situation does not appear to have changed much since the Computer III Remand proceeding.[42] They therefore cannot demonstrate significant benefits from the unseparated provision of local and intraLATA information services.

To some extent, the BOCs recognize their failure to offer much in the way of new information services on a mass market basis, but their primary excuse for their mediocre performance is the interLATA restriction -- first under the MFJ[43] and now in Section 271 of the Communications Act. Recently, the BOCs have been clamoring for relief from the application of LATA boundaries to their Internet and other "advanced" broadband packet-switched information services, arguing that those services are necessarily

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[41] See "Mixed Results: An Inside Look At The RBOCs In Electronic Publishing," IAC (SM) Newsletter Database (TM), SIMBA Information Inc. Electronic Information Report, No. 6, Vol. 17 (Feb. 9, 1996); "On To Bigger Things, RBOCs Finally Kill Gateways," IAC (SM) Newsletter Database (TM), Simba Information, Inc. Electronic Information Report, No. 16, Vol. 15; ISSN: 1076-0490 (May 6, 1994).

[42] See Computer III Remand Order, 6 FCC Rcd at 7619, ¶¶ 102-103.

[43] See Affidavit of Jerry A. Hausman, U.S. v. Western Electric Co., Inc. and American Tel. and Tel. Co., C.A. No. 82-0192 (D.D.C. June 10, 1993)(depicting BOC information services as struggling for survival on account of the MFJ's interLATA restriction).

provided on an interLATA basis.[44] Since these information services are provided on an interLATA basis, the BOCs are precluded from their provision, in the absence of forbearance, unless and until they obtain in-region interLATA service authority under Section 271 of the Act (except for incidental services, as defined in Section 271(g))).[45] If that is the case, of course, relief from the structural separation requirement for their local and intraLATA information services in the instant proceeding will not do much for the BOCs' advanced information services. Since the structural separation requirement is not the problem, even accepting the BOCs' definition of the problem, the elimination of that requirement cannot bring about significant benefits, at least for this important segment of the BOCs' information services.

Diminished Cost Savings: Similarly, as the Further Notice suggests, the net benefit to the BOCs resulting from elimination of structural separation for local and intraLATA information services is partially negated by the separate affiliate requirement for interLATA information services in Section 272 of the Act. Since the BOCs will have to provide all of their interLATA informaton services -- including the advanced services

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[44] See, e.g., Petition of Bell Atlantic at 3, 11-12 & nn. 12, 13, Petition of Bell Atlantic Corporation for Relief from Barriers To Deployment of Advanced Telecommunications Services (Jan. 26, 1998).

[45] Cf. id. at 11.

discussed in their forbearance petitions -- through separate affiliates in any event, a significant portion of the costs of structural separation will have to be incurred irrespective of the outcome of this proceeding.[46]

Previously, each of the BOCs claimed that setting up separate subsidiaries would cost 10 to 15 million dollars, which would constitute a hefty portion of the total costs of structural separation.[47] More recently, subsequent to the passage of the 1996 Act, some of the BOCs have tried to flee from their prior statements and now take the position that the set-up costs are a relatively insignificant part of the total costs of structural separation and that "an undue emphasis on the costs factor undermines a company's freedom to base its marketing decisions on a variety of factors."[48] This about-face, however, should not be allowed to obscure the significantly diminished savings that the BOCs can demonstrate from elimination of the structural separation requirement for local and intraLATA information services.

The Irrelevance of Transition Costs: Moreover, the Further

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[46] See Further Notice at ¶ 55.

[47] See, e.g., "US West: Factors Supporting Integrated Enhanced Services," attached to letter from Elridge A. Stafford, US West, Inc., to Donna R. Searcy, FCC, dated Sept. 26, 1991, CC Docket No. 90-623.

[48] See, e.g., letter from Robert J. Gryzmala, Southwestern Bell Telephone Co., to William F. Caton, Acting Secretary, FCC, CC Docket No. 95-20, dated June 21, 1996 (Gryzmala letter), at 8-9.

Notice also raises a related cost issue that is irrelevant to this proceeding, namely, the personnel, operational and other non-set-up costs of transitioning the BOCs' local and intraLATA information services to structural separation.[49] Since California III has already returned the industry to structural separation, absent a waiver, the BOCs should not be able to "count" the costs of transitioning to a regime they should already be following. For purposes of any rational cost-benefit analysis, the status quo is the policy of structural separation; the issue now is whether that regime should be replaced by the integrated provision of information services subject to nonstructural regulations.

Because the starting point for the analysis is structural separation, any transition costs -- e.g., transferring information services to a separate subsidiary -- are irrelevant. Only because the Commission has granted an interim waiver of the Computer II structural separation rules in the Interim Waiver Order are the BOCs able to provide information services on an integrated basis. The fundamental principle underlying the waiver process is that the waiver recognizes the validity of the rule being waived. WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969). A waiver may not be so broad as to eviscerate the rule, but rather should be a narrowly tailored exception to the rule. Id. at 1159. The Interim Waiver Order thus effected no

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[49] See Further Notice at ¶ 56.

change in the structural separation rules that were restored by the Ninth Circuit's vacation and remand of the structural relief granted by the Computer III Remand Order.

Since the public policy status quo is structural separation, the BOCs would have already established separate subsidiaries for their information services, but for the waiver. They thus would have incurred no additional one-time costs, but for the waiver, in the event that the Commission ultimately decides to continue the structural separation regime. The costs of moving to the status quo, albeit temporarily waived, accordingly cannot be considered in determining whether to change the status quo. If the Commission counts the costs of "returning" to the regulatory status quo as a reason for changing the rule, it will have allowed the BOCs to bootstrap a mere waiver into the basis for an entirely new policy, contrary to the basis on which the Interim Waiver Order was granted.

The BOCs Cannot Show Any Impact on Their Offering of Information Services: Moreover, there is no reason, other than the BOCs' assertions, to believe that they could not have offered, under structural separation, the same information services that they have offered on an integrated basis. Obviously, the BOCs prefer to offer information services in a manner that best exploits their monopoly advantages -- i.e., jointly with their regulated services. As long as there was a possibility of structural relief, there was not much incentive to

offer information services on a fully separated basis. That the BOCs were incented to hold out for more favorable conditions, however, is not the same as a showing that they could not have offered the same information services at the same rates under structural separation.

Unless the Commission requires the latter showing as a first step in demonstrating the benefits of structural integration, the benefits side of the balance becomes a makeweight that is automatically satisfied by the mere fact that the BOCs prefer the change and will hold out for it. It is not good public policy to reward the BOCs for denying the public a new service until the BOCs can offer it under conditions more favorable to themselves. Thus, the BOCs cannot logically demonstrate a public benefit resulting from structural integration merely by the coincidence of structural relief and the offering of new BOC information services.

Instead, they must at least show, through economic data, that structural integration creates such significant efficiencies in the provision of information services that it has made and will make a difference in determining whether such services could be offered. In other words, the BOCs must show that they could not, under structural separation, have profitably offered on a competitive basis the information services they are offering now on an integrated basis.

It is extremely unlikely that the BOCs ever could make such

a showing that is supportable in any meaningful sense, since, as the Further Notice points out, thousands of ISPs, all of whom are completely separated from the BOCs' network operations, somehow manage to provide a wide variety of mass market and other information services.[50] Moreover, the ISPs are able to do so even in the face of continuing BOC discrimination and unresponsiveness to ONA service requests. It is also doubtful that structural relief would make the difference between offering and not offering an information service, given the tremendous mark-up the BOCs enjoy on their information services. Furthermore, some of the BOCs voluntarily provide their information services through partially separated subsidiaries, casting further doubt on the argument that it would be impossible for them to provide information services profitably through fully separate subsidiaries.[51]

Finally, any showing of greater efficiencies from the integrated provision of BOC local exchange and intraLATA information services is a double-edged sword in any cost-benefit policy analysis, since such efficiencies necessarily exploit the BOCs' monopoly in local services. Those efficiencies, therefore, are another risk to competition from the elimination of

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[50] See Further Notice at ¶

[51] See, e.g., Application of Pacific Bell (U 1001 C) for Authorization to Transfer Specified Personnel and Assets, Application 90-12-052, Decision 92-07-072 (CPUC July 22, 1992) (Pacific Bell Transfer).

structural separation, not a benefit.

In sum, the BOCs have never made a strong case for the benefits of structural integration, and now, the case is even weaker. They have had even more years under waivers of the structural separation rules to demonstrate the benefits of structural integration in terms of actual mass market services, but even more of those have failed in the intervening years. As for the newer broadband information services, the interLATA restrictions effectively moot (for non-incidental services) whatever impact structural separation of local and intraLATA information services might have had. Finally, Section 272 requires interLATA information services to be provided through a separate affiliate, thereby greatly reducing the additional costs that otherwise might have been incurred in complying with the structural separation requirement for local and intraLATA information services.

B. The BOCs Cannot Demonstrate Public Benefits Resulting From Structural Integration That Could Not Also Occur Under Structural Separation

Even assuming that the BOCs could somehow have shown significant benefits to themselves from the elimination of structural separation, that would still not be enough; the benefits must accrue to the public and must result only from structural integration. In order to demonstrate a logical causal relationship between such public benefits and structural integration, it must be shown that such benefits could not have

been generated by an alternative means under structural separation.[52] Taking the one significant BOC information service -- voice messaging -- as an example, it must be shown not only that the BOCs could not have provided it profitably under structural separation but also that other ISPs are not providing it at the same rates and could not do so, even if they had been provided with the BOC network features they need in order to offer voice messaging at similar rates.

The BOCs Cannot Show That Equivalent Public Benefits Would Not Have Occurred Under Structural Separation: The central benefits analysis in this proceeding is whether the public would enjoy the same or greater benefits from expanded low-cost voice messaging services and other information services under structural separation if ISPs were provided suitable, nondiscriminatory access to the BOC networks. That was how the same benefits issue was framed in the Custom Calling Denial Order, where the FCC found that the local telephone companies' unwillingness to provide information services on a structurally separated basis "does not necessarily foreclose the availability of similar services to consumers" "if the local telephone

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[52] In the Further Remand Notice (cited in the Further Notice at ¶ 2 & n.7), the Commission recognized that, in a rational cost-benefit analysis, the putative benefits of a given policy choice must be shown to result only from that choice; i.e., it must be shown that such benefits could not also result if the opposite choice were made. Further Remand Notice at ¶ 39 (parties should "identify the benefits" of structural separation "and articulate why these benefits cannot be achieved under a regime of nonstructural safeguards").

companies provide the requisite interconnection facilities" to other providers.[53]

The FCC also followed that approach in the Computer III Notice of Proposed Rulemaking (Computer III Notice), when it stated, after noting that other voice messaging providers had not offered comparable services since the Custom Calling Denial Order:

> Of course, the type of interconnection that might have been used by others to configure services of this nature, at costs comparable to those inherent in AT&T's proposed custom calling services, was unavailable. See our discussion of the details of this in Sections IV and V infra. Had comparably efficient interconnection been available, others might be providing such services today. Absent such interconnection, the costs were far higher than the telephone companies' costs of providing such custom calling services on an integrated basis, and this may explain why alternatives have not arisen.[54]

In the referenced portions of the Computer III Notice (Sections IV and V), the Commission discussed its proposals for open interconnection for ISPs, which led to the Computer III ONA principles.[55] The FCC explicitly noted that "we are soliciting comment on interconnection ... opportunities that could facilitate efficient access by others to the [local] exchange

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[53] American Telephone & Telegraph Company Petition for Waiver, 88 FCC 2d 1, 26, 31 (1981) (emphasis added).

[54] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 50 Fed. Reg. 33581, 33582 n.8 (Aug. 20, 1985) (Notice of Proposed Rulemaking) (emphasis added).

[55] Id. at 33599-602.

[network]," and "these [proposed] changes might make it possible for [voice messaging] services ... to be provided consistently with our Computer II [structural separation] policies."[56] The Commission has never given any reason for abandoning this analytical approach.

As explained in more detail in Part III, infra, to the extent that there is an obstacle to "mass market" information services, it is the unavailability of reasonably priced, nondiscriminatory access to the BOCs' networks, not structural separation. In Computer III, several parties submitted extensive record material demonstrating the BOCs' campaign to deny voice messaging providers and other ISPs the interconnections they need to the network features they need to provide competitive services. The most compelling single example of such discrimination was the Georgia Public Service Commission's MemoryCall Order,[57] which reads like a textbook example of BOC discrimination and anticompetitive conduct against competing providers. In Part III, infra, additional examples of more recent BOC discriminatory conduct demonstrate that it is such discrimination, not structural separation, that inhibits the offering of new services.

In its order initiating a rulemaking addressing intrastate

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[56] Id. at 33602 (emphasis added).

[57] In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, Docket No. 4000-U (Ga. PSC, June 4, 1991).

access to LEC network features, the California Public Utilities Commission confirmed that the joint provision of BOC information services subject only to nonstructural regulations may well have denied, rather than facilitated, benefits to the public. In describing the problems that "arise when the dominant carrier is both a competitor and a supplier to independent unaffiliated providers,"[58] the CPUC stated:

> The participation of dominant carriers in potentially competitive markets can have a chilling effect on the emergence of competition if the competitive safeguards are perceived by competitors (regardless of what regulators themselves think) to be ineffective. The threat of being faced with a multibillion dollar competitor with bottleneck power who can squash other providers at will is a deterrent to potential entrants. We believe that inadequacies in federal regulatory safeguards may very well be responsible for much of the current lack of interest in mass market ventures.[59]

Similarly, an ATSI filing amply demonstrates that the BOCs have been discriminating against independent voice messaging providers.[60] Moreover, as the Court found in California III,

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[58] Order Instituting Rulemaking and Order Instituting Investigation. Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, R. 93-04-003; Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, I. 93-04-002 (Cal PUC, April 13, 1993).

[59] Id. at 15.

[60] Letter from Robert J. Butler to William F. Caton, Secretary, FCC, dated December 13, 1994, with attachments, to be submitted separately as Tab B.

there still has not been the type of fundamental unbundling of the network that was originally contemplated in Computer III. 39 F.3d at 929-30. Thus, even assuming that mass market voice messaging or other information services were not available until recently, there is no reason to believe that structural separation was the reason. Rather, it was, and remains, the lack of reasonably priced, nondiscriminatory network access for ISPs that has suppressed the wider availability of cheap voice messaging and other information services. Eliminating structural separation thus benefits only the BOCs, not the public, since the public would have enjoyed the same benefits from ISPs, whether or not the BOCs were prevented from offering such services by structural separation.

The potential availability of all mass market and other information services from ISPs highlights another problem for any showing of public benefits that the BOCs claim for the elimination of structural separation -- namely, that the types of cost savings and efficiencies claimed for structural integration are not unique to the BOCs. Although the BOCs still possess the advantages of monopoly control over access to the customer, they no longer argue that they enjoy advantages such as greater efficiencies. For most BOC information services, the BOCs have long since given up on trying to demonstrate efficiencies that are inherent in the BOCs' networks, such as technical network architecture integration efficiencies. Rather, the BOCs only

claim that structural integration will allow such efficiencies as joint marketing and billing.[61] They admit, that if anything, they are moving away from technical integration of their information and basic services.[62] Indeed, the BOCs have admitted that "[t]he economies of scope and scale available to the Regional Bell Operating Companies (RBOCs) are in many cases available, if in lesser measure, to large customers."[63]

Since any large customer of the BOCs could realize the same types of savings claimed by the BOCs, assuming it enjoyed full access to the BOCs' network features, elimination of structural separation is not a necessary prerequisite for such savings, or for the public benefits such savings could provide, in terms of information services competition. Rather, fully unbundled access to the BOCs' networks remains the only key to the public benefits the Commission is trying to foster.

The BOCs Have Never Been a Significant Source of Innovation in Information Services: The BOCs assert, and the Commission seems to have assumed, that structural separation inhibits

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[61] Computer III Remand Order, 6 FCC Rcd at 7617-18, ¶¶ 99-100.

[62] See Computer III Remand proceeding, BellSouth Reply Comments at 11-13 (April 8, 1991); US West Reply Comments at 47-51 (April 8, 1991).

[63] Reply Affidavit of Kenneth J. Arrow and Andrew M. Rosenfield in Support of Section VII Motions for Removal of the Section II (D)(I) Restriction on the Provision of Information Services at 13, United States v. Western Electric Co. Inc. and American Tel. and Tel. Co., C.A. No. 82-0192 (D.D.C. Jan. 8, 1991).

innovation and the development of new BOC information services. The Commission accordingly proffers a cost-benefit paradigm under which the dampening of innovation under structural separation is balanced against the ratepayer and competitive risks of eliminating structural separation.[64] The problem with that approach is that, even with unseparated BOC information services, the BOCs have never been a significant source of innovation in information services. There is, in other words, nothing on one side of the equation to balance against the risks from eliminating structural separation. Like the Emperor's New Clothes, there is no BOC innovation to inhibit.

For example, the innovations in high-speed digital subscriber line (xDSL) and Internet services have originated with competitive carriers like MCI and ISPs, as well as the computer industry, not the BOCs. In fact, as a recent article in the trade press points out, the BOCs have known about xDSL technology for several years but have not deigned to use it to offer high-speed Internet access to residential users.[65] Since they have had the benefit of either the Computer III or Computer III Remand orders or waivers of structural separation on remand from those orders, structural separation clearly cannot be blamed for their reluctance to bring such services to the mass market. More

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[64] See Further Notice at ¶ 48.

[65] J. Rickard, "You, Me and Computer III - The XDSL Rosetta Stone," Boardwatch Magazine (March, 1998).

likely, it is because they do not care to make the underlying network facilities used to provide such services available to their competitors and because the business market is so much more lucrative.[66]

What has spurred innovation in information services is the competition from multiple providers. Basic Rate ISDN, an ILEC loop technology, has taken several years to deploy because the ILECs have exclusive control of the local network.[67] Primary Rate ISDN, on the other hand, offered by a multitude of service providers in a competitive environment, was widely deployed in interexchange carrier switches considerably earlier, in the early 1990's.

The vibrant competition in Internet backbone services is another good example of the effect of competition on innovation and investment. Companies such as Qwest, IXC, Level 3 and others continue to invest in national broadband networks without special government incentives. The number of national Internet backbone providers has grown from nine in mid-1996 to 37 by the fall of 1997.[68] In addition, numerous ISPs in addition to MCI operate

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[66] Id.

[67] "Rates `in the Stratosphere;' US West Withdraws ISDN Tariff After Consumers Raise Clamor," Communications Daily, March 21, 1996 (Arizona Corporation Commission spokesman states US West has been slow to provide ISDN in the face of high demand for several years; "Foot dragging is a phrase that comes to mind.")

[68] Joint Reply Comments of WorldCom, Inc. and MCI Telecommunications Corporation, Docket No. 97-211, at 74, citing *Boardwatch Magazine*, May/June, Fall 1997.

backbone networks, and, like MCI, have also expanded, and continue to expand, their backbone networks.

Not only have the BOCs slow rolled their offerings of these services to the mass market, but, as will be discussed in more detail in Part III, infra, they are resisting the type of unbundling of their local loop facilities that is necessary for competitive providers to make these broadband information services even more widely available. Thus, the Commission's benefits paradigm has it backwards. It is not a question of whether the inhibiting effects of structural separation are justified by the protection it provides to ratepayers and competition, as the Commission poses the cost-benefit balance. Rather, it is the BOCs' denial of access to unbundled local loops and other network facilities that inhibits both competition and innovation, while structural separation helps to incent the BOCs to provide the access that competitors need, thereby spurring innovation and the development of new services.

It follows from the above that the Commission need not be concerned that elimination of structural separation is necessary or appropriate to encourage the provision of innovative information services to the public, as suggested in the Further Notice.[69] Rather, continuation of structural separation is much more likely to lead to the profusion of innovative services, since the BOCs will only be induced to open up the network to

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[69] Further Notice at ¶¶ 1, 7, 48.

competitors if they are under a structural separation regime. Once the network is unbundled to the extent that is needed by ISPs, they can be relied upon to provide all of the innovative services needed by the public. As long as the local network remains a BOC preserve, however, the BOCs will not have any incentives to provide innovative information services.

In summary, since the Commission has never fairly tested the condition stated in the Custom Calling Denial Order and the Computer III Notice -- i.e., ensuring that ISPs have the network access they need to provide mass market voice messaging and other information services -- it will never be known whether such services could have been made more widely available under structural separation. Thus, the BOCs cannot show that any significant public benefits have accrued or will accrue under structural integration that could not have been generated under structural separation. In assessing a policy shift from structural separation to the joint provision of BOC local telecommunications and information services, there is therefore nothing on the public benefits side of the cost-benefit balance, even if the BOCs can show cost savings to themselves from structural integration.

C. Elimination of Structural Separation is Not Necessary for "One-Stop Shopping" for BOC Local and Information Services

As mentioned above, the passage of the 1996 Act has led the BOCs to shift their arguments concerning the cost savings from

the elimination of structural separation. Instead of stressing the costs of setting up separate subsidiaries, which are now required for their interLATA information services, they now focus on operational costs, such as marketing.[70] Since no marketing is necessary for the BOCs' monopoly local services, of course, it is difficult to see how the elimination of structural separation would save marketing costs in any event. Only the competitive information services require any marketing, and such marketing would incur the same costs irrespective of which operating entity performed it.

Even aside from that problem, however, the elimination of structural separation is not necessary to reduce marketing expenses because joint marketing is perfectly possible under structural separation. A BOC information service subsidiary could resell the BOC's local services together with its information services and market them as a package, assuming that the same local services were equally available to all comers on the same terms and conditions, including unrestricted resale, and all of the nonstructural safeguards also applied. Under these conditions, such joint marketing by the BOC information service subsidiary would meet the BOCs' legitimate efficiency goals without leveraging the BOC network monopoly.[71] Such an

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[70] See, e.g., Gryzmala letter at 8-9.

[71] Of course, such joint marketing would have to be carried out in conformance with the CPNI rules established in Implementation of the Telecommunications Act of 1996:

arrangement is permitted for interLATA information services under Section 272, subject to all of the nondiscrimination requirements of Section 272(c) and (e), and a parallel joint marketing structure for separate intraLATA information services would achieve the same policy goals.

Since the BOCs could engage in joint marketing of local and intraLATA information services through their information service subsidiaries, they cannot cite joint marketing cost savings as a reason to eliminate structural separation. Thus, there are no significant types of cost savings that the BOCs can claim that are relevant to the structural separation issue.

In the event that the Commission nevertheless eliminates structural separation, however, MCI agrees with ATSI that the abuses that are possible under joint marketing in the absence of structural separation require that joint marketing of local and intraLATA telecommunications services with information services be prohibited. It is the provision of both types of services through the entity that enjoys a monopoly network position that makes possible such abuses as "unhooking," in which subscribers who call in to order features to be used with competitive information services are solicited to buy the BOC's information services. Thus, in response to paragraphs 127-29 of the Further Notice, MCI takes the position that such joint marketing should

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Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 98-27 (released Feb. 26, 1998).